JURISDICTIONAL

STATEMENT

15

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 675

JAMES PETTY AND TOM E. DEANE,
Appellants,

vs.

STATE OF IDAHO

APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

STATEMENT AS TO JURISDICTION

EDW. S. FRANKLIN,
WM. S. HAWKINS,
E. L. MILLER,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 675

JAMES PETTY,

Appellant,

vs.

STATE OF IDAHO,

Respondent

TOM E. DEANE,

Appellant,

vs.

STATE OF IDAHO,

Respondent,

PETITION FOR ALLOWANCE OF APPEAL AND JURISDICTIONAL STATEMENT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Tom E. Dean and James Petty, respectfully pray that an order be issued out and under the seal of this Court allowing this appeal to review the decision of the Supreme Court of the State of Idaho rendered on the 23rd day of July, 1952 and filed on October 9th, 1952, which State Supreme Court did, by 3-2 decision, reverse the judgment of the Court of original jurisdiction, being the Eighth Judicial District Court of the State of Idaho in and for the

County of Kootenai and held that the provisions of 18-6607 Idaho Code was constitutional against the contention of the appellants that the statute denied the appellants personal liberties as guaranteed by the 14th Amendment to the Constitution of the United States. The petition is made to this Court as the Remittitur of the Supreme Court of Idaho was filed before the petitioners could petition in the State Court.

Opinions Below

The judgment of the Court of original jurisdiction is unreported but a copy thereof is annexed to this petition.

The majority and dissenting opinions of the Supreme Court of the State of Idaho, in the instant case, are reported in 248 Pac. 2nd 218. Another companion case of *State* vs. *Wall*, 248 Pac. 2nd 222, raised the same issues.

The Supreme Court of the State of Idaho disposed of the constitutional questions in this matter upon the authority of a companion case which was submitted to the Supreme Court of the State of Idaho at the same term and is reported as *State* vs. *Evans*, 245 Pac. 2nd 788.

Jurisdiction

Jurisdiction to review this appeal is conferred upon this Court by the provisions of 28 U. S. C. A. 1257 (2).

The judgment of the Supreme Court of the State of Idaho was filed with the remittitur in the office of the Clerk of original jurisdiction on the 9th day of October, 1952 after denying petitioners' application for rehearing.

Summary and Short Statement of Case

Identical informations were filed against the appellants by the Prosecuting Attorney of Kootenai County, State of Idaho on behalf of the State of Idaho, respondent, charging the appellants with violation of the lewd and lascivious statute of the State of Idaho, being 18-6607 Idaho Code.

Demurrers were interposed against the informations challenging the constitutionality of the statute upon which they were informed against upon the grounds that the punishment provided was unconstitutional as a cruel and unusual punishment and upon the further grounds that prosecution under the statute denied the petitioners equal protection under the laws as guaranteed to them by the 14th Amendment to the Constitution of the United States.

On the 3rd day of April, 1951 the Court of original jurisdiction entered a judgment sustaining the demurrers upon the grounds and for the reasons that the statute was unconstitutional in that it did impose cruel and unusual punishment and therefore violated the 14th Amendment to the Constitution of the United States and that the statute further denied the appellants equal protection under the law as guaranteed to them by the 14th Amendment to the Constitution of the United States.

The State of Idaho appealed from this judgment.

By stipulation, the cases were consolidated and submitted to the Supreme Court as companion cases. During the same term the Court also received, for determination, the case of *State* vs. *Evans*, 245 Pac. 2nd 788, wherein identical issues were presented.

The Supreme Court of Idaho, by a 3-2 majority decision, held in the companion case of *State* vs. *Evans*, 245 Pac. 2nd 788, that the statute was constitutional. Upon the authority of the case of *State* vs. *Evans*, 245 Pac. 2nd 788, the constitutional questions, in the instant case, were determined adversely to the contention of these petitioners and the case was reversed.

The lewd and lascivious statute of Idaho provides:

> "Lewd conduct with minor or child under sixteen.—Any person who shall wilfully and lewdly commit any

lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor or child, shall be guilty of a felony and shall be imprisoned in the State Prison for a term of not more than life." 18-6607 Idaho Code.

Petitioners have at all times urged that examination of the statute shows that it clearly enunciates that the penalty shall be imprisonment for a term of not more than life, or life imprisonment.

Legislature of the State of Idaho further enacted the Indeterminate Sentencing Act of Idaho, 19-2513 Idaho Code, which was in full force and effect at the time the informations were filed and which provides as follows:

"Indeterminate sentence.—The minimum period of imprisonment in the penitentiary heretofore provided by law for the punishment of felonies, and each such minimum period of imprisonment for felonies, hereby is abolished. Whenever any person is convicted of having committed a felony, the court shall, unless it shall suspend judgment and sentence and parole offenders as provided by Chapter 26 of Title 19, Idaho Code, as amended, or unless it shall impose the death sentence as provided by law, sentence such offender to imprisonment in the penitentiary for an indeterminate period of time, but stating and fixing in such judgment and sentence shall be given accordingly, and such sentence shall be known as an indeterminate sentence; provided, however, that the enactment of this act shall not affect the indictment, information, prosecution, trial, verdict, judgment, or punishment of any felonies heretofore committed, but all laws now and hitherto in effect relating thereto are continued in full force and effect as to such crimes heretofore committed." 19-2513 Idaho Code.

In dealing with these statutes in light of the contention that the punishment was cruel and unusual, the Supreme Court of Idaho in its opinion stated as follows:

> "With considerable justification it is urged that conduct of a comparatively innocent nature, such as "necking" or "petting", where a child under sixteen is involved, may, in the eyes of some enforcement officers, constitute a violation of this statute. Be that as it may, it is obvious that the acts of a more or less trivial nature are within its broad terms. *Life imprisonment for such offenses would be cruel and unusual punishment.* Even our rape statute does not require such punishment.
>
> We are, therefore, faced with the alternative of declaring the act unconstitutional or so construing it as to comport with that instrument. It is the duty of the courts to uphold the constitutionality of legislative enactments when that can be done by reasonable construction.
>
> To construe sec. 18-6607 as requiring or permitting the district judge in imposing sentence to fix the maximum, and that it may be less than life, is a reasonable construction. The presumption is that the legislature intended to act within the limits of the constitution. Therefore, in order to give effect to the act we hold that it is to be construed as permitting the district judge to fix a maximum imprisonment at less than life."

Questions

1. Was the action of the Supreme Court of Idaho, in this case, judicial or legislative?

2. If the Supreme Court of Idaho, in its opinion, acted in a legislative capacity, does that action deprive petitioners of due process of law under the 14th Amendment?

3. Does the due process of law clause, of the 14th Amendment, protect state citizens against the destruction of the

doctrine of separation of powers by the respective branches of state government?

4. Have petitioners had equal protection of the law when the Supreme Court of Idaho in this case functioned as a legislative body and not a judicial body?

Argument

The Supreme Court of the State of Idaho, by its opinion, has conceded that life imprisonment, under the statute, would be unconstitutional as a cruel and unusual punishment. To avoid that result it is the contention of these petitioners that the Supreme Court of the State of Idaho, as evidenced by the opinion, did not act as a Court but legislated new law in the State of Idaho.

> "Nor shall any state deprive any person of life, liberty or property without due process of law." 14th Amendment to the Constitution of the United States.
>
> "But it must be observed that the prohibition of the amendment referred to all the instrumentalities of the state, to its legislature, executive and judicial authorities, and, therefore whoever, by virtue of public position, under a State government, deprives another of any right protected by that amendment against the deprivation of the state 'violates this constitutional inhibition and as he acts in the name of the state and is clothed with state power, his act is that of the state'. This must be so, or, as we have often said, the constitutional prohibition has no meaning, and the state has clothed one of the agents with power to annul or evade it." *Chicago B. & Q. Railroad Company* v. *Chicago* 166 U. S. 226

Due process of law in its very meaning, assures all persons that the legislative, judicial and executive branches of government will act within their own province and jurisdiction. The doctrine of separation of powers in government

is as much a guaranteed right to individuals as is freedom of worship, speech, and assemblage.

Under its province no state governor could conduct a trial, find guilt and pass judgment. We here contend likewise that no Court, under the due process clause, can enact new legislation during hearing or review to achieve a result. In other words the Supreme Court of Idaho has, by this opinion, not acted as a Court but has acted as a legislative body and has amended the law of the legislature to avoid the unconstitutionalities and then has gone further and repealed the Indeterminate Sentencing Act of the State of Idaho to strengthen that result insofar as applicable to lewd and lascivious conduct.

We are not unmindful of that rule of law which this Court has long adhered in refusing to reconstrue statutes which have been construed by the highest Court of the State.

Had there been statutory construction in this case there would not be this petition for appeal.

> "Of course it is not open to us to revise the construction placed upon the statute by the State Court but it is open to us to determine whether the application made of the statute in this instance was so arbitrary as to contravene fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve." *Southwestern T & T Company* v. *Danaher* 238 U. S. 482.

The petitioners further contend and do urge in this matter that they have been denied equal protection of the law when the Supreme Court of the State of Idaho quit functioning as a Court and functioned as a legislature to obtain this result. In other words they were not granted Court hearing but were subjected to legislative fiat in judicial disguise which in and of itself is foreign to equal protection of law in this nation.

We believe that the appeal presents questions of substance as to error by the Supreme Court of the State of Idaho in its interpretation of its authority and as to the question as of the constitutionality of the lewd and lascivious statute of Idaho, 18-6607 Idaho Code, in the light of the Indeterminate Sentencing Act of Idaho, 19-2513 Idaho Code, and urge that the questions herein presented are of great importance.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF IDAHO

Nos. 7778-7780

STATE OF IDAHO, *Plaintiff-Appellant,*

v.

JAMES PETTY, *Defendant-Respondent;*

STATE OF IDAHO, *Plaintiff-Appellant,*

v.

TOM E. DEANE, *Defendant-Respondent.*

Coeur d'Alene, May Term, 1952. Filed July 23, 1952, Clay Koelsch, Clerk.

Appeals from the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai. Honorable O. C. Wilson, District Judge.

To information charging lewd and lascivious conduct, the court below sustained demurrers and dismissed the actions. *Reversed.*

Robert E. Smylie, Attorney General; Wm. H. Bakes, Assistant Attorney General, Boise; and Wm. D. McFarland, Prosecuting Attorney, Coeur d'Alene, for appellant.

Wm. S. Hawkins, Coeur d'Alene, for respondents.

Davison & Davison and R. H. Copple, Boise, Amici Curiae.

TAYLOR, J.

Pursuant to stipulation these cases involving identical issues were consolidated on appeal.

The defendants, respondents here, were separately charged by information with the crime of lewd and lascivi-

ous acts under the provisions of § 18-6607 I. C. The acts charged in each case are alleged to have been committed with and upon the body and person of a female child under the age of sixteen years. Demurrers to the information were filed raising the same issues in both cases. The demurrers were sustained by the trial court on the ground that the above statute is unconstitutional. As to constitutionality, the act is attacked here on the same grounds urged in the case of *State* v. *Evans*, —— Idaho ——, filed June 16, 1952. The decision in that case disposes of all issues in these cases except that raised by subparagraph (a) of the demurrers, which urges that more than one offense is charged. In *State* v. *Evans*, supra, the lewd and lascivious acts were alleged to have been committed against the person of a female child under the age of sixteen, but no intent to rape was there alleged. Each of the informations now before us sets forth certain lewd and lascivious acts with a female child under sixteen years of age, alleges that such acts were committed "with the intent of arousing, appealing to, and gratifying the lust and passion and sexual desires of said defendant and of said minor" and continues "with the intent and purpose of having sexual intercourse with the said" minor child. Thus these informations charge the specific intent required by § 18-6607 I. C., and the specific intent required as an element of assault with intent to rape. § § 18-901 I. C., 18-907 I. C., and 18-6101 I. C. The other elements of both crimes being sufficiently alleged, the informations charge both lewd and lascivious conduct and assault with intent to commit rape.

In *State* v. *Evans*, supra, we held that the charge of lewd and lascivious conduct did not necessarily include assault with intent to rape. That is, a person might commit lewd and lascivious acts upon and with the body of a female child under sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, without the intent to have sexual intercourse. But the reverse is not true, because any acts leading to rape or assault with intent to rape, would be lewd and lascivious and would evince the intent described in § 18-6607, I. C. "* * * where an offense cannot be com-

mitted without necessarily committing another offense, the latter is a necessarily included offense." *People* v. *Greer* (Cal.) 184 P. 2d 512 at 516. *People* v. *Chapman* (D.C.A. Cal.) 185 P. 2d 424.

The statutory rule against charging more than one offense (RR 19-1413 and 19-1703 I. C.) does not apply to included offenses. *State* v. *Garney*, 45 Idaho 768, 265 P. 668; *State* v. *Alvord*, 47 Idaho 162, 272 P. 1010; *State* v. *Smailes*, 51 Idaho 321, 5 P. 2d 540; *State* v. *Hix*, 58 Idaho 730, 78 P. 2d 1003; *State* v. *Garde*, 69 Idaho 209, 205, P. 2d 504. Where the state elects to charge and prosecute on an included offense rather than on the completed or higher offense the information is not subject to challenge for duplicity even though it may appear therefrom that the completed or higher offense had been committed. *State* v. *Wall*, —— Idaho ——, filed July 23, 1952. The matter of determining which of two or more applicable criminal statutes will be invoked is for the State to decide. It is not a matter of concern to the accused so long as his constitutional and statutory rights are not violated. *State* v. *Gutke*, 25 Idaho 737, 139 P. 346. In the case of included offenses he is protected against double jeopardy since a conviction or acquittal of one is a conviction or acquittal of the other. §§ 19-107, R 19-1717, R 19-1719, 18-301 I. C.; *State* v. *Gutke*, supra, *State* v. *Randolph*, 61 Idaho 456, 102 P. 2d 913; *People* v. *Greer* (Cal.) 184 P. 2d 512.

It is a right of the accused to be informed of the exact charge against him. He is entitled to know for what specific offense he is to be tried. Art. 1, § 13, Idaho Constitution; RR 19-1409, 19-1411, 19-1418 and 19-1514 I. C. Here it is apparent from the complaints filed with the magistrate, and the informations, that the state seeks to invoke § 18-6607 I. C. and to prosecute the defendants for lewd and lascivious conduct. And this is the particular offense specifically named in the orders of the committing magistrate. The allegation in the informations of an intent to have sexual intercourse is, therefore, surplusage, subject to be striken on motion of the defendants. In any event, to be treated as such.

The demurrers should have been overruled.
Judgments reversed.
GIVENS, *C. J.*, and PORTER, *J.*, concur.

KEETON, *J.*, dissenting:

Following a commitment by the probate judge of Kootenai County, Idaho, the prosecuting attorney filed an information against the respondent, in part as follows:

> "That the said James Petty is hereby accused by Wm. D. McFarland, Prosecuting Attorney of Kootenai County, State of Idaho by this information with the crime of COMMITTING LEWD AND LASCIVIOUS ACTS UPON THE BODY OF A MINOR COMMITTED AS FOLLOWS, to-wit: * * * the said defendant James Petty did then and there feloniously, maliciously, wilfully, and lewdly commit lewd and lascivious acts upon, and with the body of * * *, a female minor, under the age of 16 years, to-wit: 15 years of age, and not the wife of said defendant, as follows: * * *"

Following this the prosecutor detailed various acts of an indecent nature alleged to have been committed by the respondent for the purpose of arousing, appealing to, and gratifying the lust and passion and sexual desires of said respondent and of said minor child, "with the intent and purpose of having sexual intercourse with the said * * *."

The respondent was arraigned, and by proper motion asked to be informed just what crime was alleged to have been committed.

The prosecutor elected to proceed and prosecute the respondent "for lewd and lascivious acts upon the body of a minor, as defined by Sec. 18-6607 Idaho Code". Thereupon, the respondent presented a demurrer to the information on various grounds, among which are the following: first, that more than one offense is charged in the information; 2nd, that Sec. 18-6607 I. C. is unconstitutional for numerous reasons alleged; further that the said Sec. 18-6607 I. C. is uncertain, vague and unintelligible, as it is impossible to determine from the section just what acts are made criminal.

The respondent contended that the section was in violation of the 14th amendment to the Constitution of the United States which provides "no state shall make or enforce any law which shall * * * nor deny to any person within its jurisdiction the equal protection of the laws", and further contended that it was in violation of Sec. 6, Art. 1, of the Constitution which, among other things provides: " * * * Excessive bail shall not be required, nor excess fines imposed, nor cruel and unusual punishments inflicted."

The district judge sustained the demurrer on all the grounds alleged and dismissed the proceedings. The State appealed.

I discussed briefly the constitutionality of the statute in question in a dissenting opinion in the case of State v. Evans, Case No. 7849, filed June 16, 1952, —— Ida. ——, —— Pac. (2d) ——. I will not repeat here what I there said, as the dissenting opinion is applicable to the matter now being considered as well as to the case of State v. Evans. The statute, Sec. 18-6607 I.C., in my opinion, is clearly unconstitutional.

In this case, as in the case of State v. Evans, the attorney general argued that the provision of the law challenged here was inconsistent with other defined sex offenses and that the same were therefore necessarily impliedly repealed, so far as covered by the statute under discussion; and further contended that if such inconsistent statutes and penalities, particularly those that provided a lesser penalty for their violation were not impliedly repealed, then, of course, the statute was unconstitutional as not affording equal protection of the law to all persons.

The holding of the majority opinion " * * * any acts leading to rape or assault with intent to rape, would be lewd and lascivious and would evince the intent described in Sec. 18-6607 I.C. (lewd and lascivious statute), and "The statutory rule against charging more than one offense * * * does not apply to included offenses. * * * Where the state elects to charge and prosecute on an included offense rather than on the completed or higher offense the information is not subject to challenge for duplicity even though it may appear therefrom that the completed or higher offense had been committed."

If I correctly interpret this holding, one could be charged with rape under circumstances defined by the statute under consideration, Sec. 18-6607 I.C., and convicted of a violation of the lewd and lascivious statute as an included offense.

In other words, a violation of the lewd and lascivious statute, Sec. 18-6607 I.C., is a lesser offense than rape, Sec. 18-6101 I.C., or assault with intent to commit rape, Sec. 18-907 I.C. Thus a person could be put on trial for rape in violation of Sec. 18-6101 I.C., with a minimum sentence provided in Sec. 18-6104 I.C. of one year imprisonment, and on conviction of the asserted lesser offense, a violation of the lewd and lascivious statute, be sentenced to the penitentiary for life.

This case was not argued to this Court on any such grounds. The attorney general and the attorneys representing the respondent made no argument, nor did they or either file any briefs on the points supposed to be decided. On the points decided the respondent has never been heard. A lesser offense is necessarily one in which the punishment to be imposed is less than the punishment that could be imposed were the person convicted of the higher offense. An included offense is necessarily a lesser and not a greater offense.

The term "lesser offense" in statute prohibiting sentence or finding of guilt for lesser offense than offense charged means offense necessarily included in offense defined in particular section of act. Ramsey v. State, 183 N.E. 648, 204 Ind. 212.

A proper distinction between "included and non-included offenses" in a criminal statute is whether they involve essentially same or different elements of conduct, and if both offenses have a common basis, the greater offense is usually deemed to include the lesser. People v. Gossman, 212 Pac. (2d) 585, 95 Cal. App. (2d) 293. See also People v. Chapman, 185 Pac. (2d) 424, 81 Cal. App. 857, and People v. Greer (Cal.) 184 Pac. (2d) 512.

The rule is stated in 42 C.J.S. 1294, Sec. 271, in substance as follows: Where an indictment charges an offense which includes within it another *lesser* offense, or one of a

lower degree, accused although acquitted of the higher offense, may be convicted of the lesser; and at page 1297, Sec. 275, the author states:

> "To warrant conviction of a lesser offense on an indictment or information charging a greater offense, it is essential that the allegations describing the greater offense contain all the essential averments relating to the lesser offense or that the greater offense necessarily include all the essential ingredients of the lesser."

It is further a statutory rule that an indictment can only charge one offense. Sec. 19-1413 I.C.

A similar criminal act or transaction cannot be split into two or more separate offenses. The same act or transaction cannot constitute two or more crimes, the essential elements of which are mutually exclusive. If the essential elements of two crimes are distinct and different and the one crime cannot be included in the other, a person cannot be guilty of both crimes under the same set of facts.

> "Where certain elements of crime charged may be taken away leaving necessary elements for another complete crime, latter is termed 'included offense' ". State v. Marshall, 220 N.W. 106, 206 Iowa 373.

It seems to me the holding in the majority opinion goes so far afield from well known, established, fundamental, axiomatic propositions of law and procedure, that no extensive discussion should be required to lead one to the conclusion that lewd and lascivious conduct is not and cannot be included as a lesser offense in a charge of assault with intent to commit rape, or rape. The two crimes are distinct and altogether different offenses. A violation of one section does not violate the other.

What has been said in the case of State v. Petty applies equally to the case of State v. Deane. The facts are similar and hence will not be separately commented on.

For the above and other reasons, the ruling of the trial court was correct and should be affirmed.

THOMAS, *J.*, dissenting:

I adhere to the views expressed in the dissent of Justice Keeton and the dissent of the writer in the case of State v. Evans, No. 7849, filed June 16, 1952, — Idaho —, — P. 2d —. For the reasons set forth in such dissenting opinion, the judgment of the lower court sustaining the demurrer to the indictment on the ground that Section 18-6607, Idaho Code, is unconstitutional, should be affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 675

JAMES PETTY AND TOM E. DEANE,
Appellants,

vs.

STATE OF IDAHO

APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 675

JAMES PETTY AND TOM E. DEANE,

Appellants,

vs.

STATE OF IDAHO

Appellee

STATEMENT OF APPELLEE IN OPPOSITION TO APPELLANTS' PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes Now the Attorney General of the State of Idaho on behalf of the State of Idaho, appellee in the above entitled matter, pursuant to Rule 12 (3), Supreme Court Rules and discloses the following as ground making against the jurisdiction of this Honorable Court in the said matter.

Summary of Action

On the 8th day of December, 1950, criminal complaints were filed in the Probate Court of Kootenai County, Idaho, charging appellants in this action with violation of Section 18-6607, Idaho Code, the so-called Lewd and Lascivious Statute. They were bound over for trial and on the 19th

day of March, 1951, Informations were filed against appellants herein in the District Court charging violation of Section 18-6607, Idaho Code. Demurrers were filed to the Informations in both cases, which, except for the names were identical. The demurrers raised the question of unconstitutionality of the statute under which the appellants were charged. Appellants urged that the statute conflicted with the Constitution of Idaho in the following particulars:

> "Comes now James Petty (Tom Deane), the above named defendant, by and through his attorney of record, and demurs to the information filed against said defendant in the above entitled Court on March 19, 1951, upon the following grounds:
>
> * * * *
>
> "(g) The facts stated purporting to charge the defendant with lewd and lascivious acts upon the body of a minor under the age of 16 years do not state or constitute a public offense in that the same is unconstitutional for the reason that it is in violation of Section 6, Article 1 of the Constitution of the State of Idaho which provides that 'no excessive fines be imposed or cruel or unusual punishment be inflicted; for the reason that said Section 18-6607 Idaho Code provides a mandatory sentence of life imprisonment, which sentence is unusual in that the acts set forth in the information alleged to be the manner and means and which constituted the lewd and lascivious acts complained of also charge and constitute the crime of assault with intent to commit statutory rape, the penalty for which is only 14 years imprisonment."

On April 3, 1951, the District Court sustained the demurrers to the informations on the ground that the statute under which they were charged was void as being in violation of the Constitution of the State of Idaho and the Constitution of the United States. On April 17, 1951, the cases were appealed to the Supreme Court of Idaho by the State.

The cases of *State* v. *Petty* and *State* v. *Deane* were consolidated for hearing and disposition.

At approximately the same time the above cases arose, another case in the Sixth Judicial District for Bingham County arose on a similar state of facts charging one J. C. Evans with a violation of the identical statute here involved. A general demurrer was likewise interposed in the *Evans* case and the District Court sustained the demurrer on the same grounds and for the same reasons as the Court had in the *Petty* and *Deane* cases. The *Evans* case was also appealed by the State to the Supreme Court and all three cases were pending at the same time.

The *Evans* case was presented to the Supreme Court of Idaho at the Pocatello term, a few weeks prior to the time the *Petty* and *Deane* cases were presented to the Supreme Court sitting at Coeur d'Alene. It is the *Evans* case which the Court referred to in its opinion. *State* v. *Evans*, 245 P. 2d 788.

The Statute involved in Section 18-6607, Idaho Code, which provides:

> "18-6607. Lewd Conduct with Minor or Child under Sixteen.—Any person who shall wilfully and lewdly commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor or child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor or child, shall be guilty of a felony and shall be imprisoned in the State Prison for a term of not more than life."

On July 23, 1952, the Supreme Court of Idaho following the rule announced in the *Evans* case reversed the District Court in the cases of *State* v. *Petty* and *State* v. *Deane* and held that Section 18-6607, Idaho Code, was constitutional against the contentions advanced that it was un-

constitutional. Motion for rehearing was made by appellants Petty and Deane and was duly denied by the Court.

Section 19-2513, Idaho Code, the so-called Indeterminate Sentencing Act was enacted by the Idaho Legislature in 1947 and was in force at all times herein mentioned. That Act provides:

> "19-2513. INDETERMINATE SENTENCE.—The minimum period of imprisonment in the penitentiary heretofore provided by law for the punishment of felonies, and each such minimum period of imprisonment for felonies, hereby is abolished. Whenever any person is convicted of having committed a felony, the court shall, unless it shall suspend judgment and sentence and parole offenders as provided by Chapter 26 of Title 19, Idaho Code, as amended, or unless it shall impose the death sentence as provided by law, sentence such offender to imprisonment in the penitentiary for an indeterminate period of time, but stating and fixing in such judgment and sentence the maximum term of imprisonment provided by law therefor, and judgment and sentence shall be given accordingly, and such sentence shall be known as an indeterminate sentence; provided, however, that the enactment of this act shall not affect the indictment, information, prosecution, trial, verdict, judgment, or punishment of any felonies heretofore committed, but all laws now and hitherto in effect relating thereto are continued in full force and effect as to such crimes heretofore committed."

Counsel for Petty and Deane urged the Court that this statute made mandatory a sentence of life for a violation of the Lewd and Lascivious Statute and that that amounted to a cruel and unusual punishment and was in conflict with Section 6, Article 1 of the Constitution of the State of Idaho. The Court in the *Evans* case, cited by the Court in *State* v. *Petty* and *State* v. *Deane*, held:

> "With considerable justification it is urged that conduct of a comparatively innocent nature, such as 'neck-

ing' or 'petting', where a child under 16 is involved, may, in the eyes of some enforcement officers, constitute a violation of this statute. Be that as it may, it is obvious that acts of a more or less trivial nature are within its broad terms. Life imprisonment for such offenses would be cruel and unusual punishment. Even our rape statute does not require such punishment. Storseth v. State, Idaho, 236 P. 2d 1004.

"(10) We are, therefore, faced with the alternative of declaring the act unconstitutional or so construing it as to comport with that instrument. It is the duty of the courts to uphold the constitutionality of legislative enactments when that can be done by reasonable construction. Scandrett v. Shoshone County, 63 Idaho 46, 116 P. 2d 225; State ex rel. Wright v. Headrick, 65 Idaho 148, 139 P. 2d 761.

"(11) To construe § 18-6607 as requiring or permitting the district judge in imposing sentence to fix the maximum, and that it may be less than life, is a reasonable construction. The presumption is that the legislature intended to act within the limits of the constitution. . . ."

Argument

Counsel for appellants Petty and Deane propound the following questions:

"1. Was the action of the Supreme Court of Idaho, in this case, judicial or legislative?

"2. If the Supreme Court of Idaho, in its opinion, acted in a legislative capacity, does that action deprive petitioners of due process of law under the 14th Amendment?

"3. Does the due process of law clause, of the 14th Amendment, protect state citizens against the destruction of the doctrine of separation of powers by the respective branches of state government?

"4. Have petitioners had equal protection of the law when the Supreme Court of Idaho in this case functioned as a legislative body and not a judicial body?"

We think that no substantial federal question is framed by the issues of the case or by the questions above propounded. The demurrers raised the question of unconstitutionality of the Lewd and Lascivious Statute because the punishment provided was cruel and unusual. The statute was alleged to be contrary to Article 1, Section 6, Constitution of Idaho.

The Supreme Court has construed the statute in such a manner that the objection that the statute carries a cruel and unusual punishment is removed. *Alabama State Fed. of Labor* v. *McAdory*, 65 Sup. Ct. 1384, 325 U. S. 450, 470, 89 L. ed. 1725. The essence of appellants' argument is that the Supreme Court of Idaho is wrong, it has misconstrued the Constitution of Idaho, that it should have declared the Lewd and Lascivious Statute, Section 18-6607, Idaho Code, unconstitutional, that the failure to do so amounts to judicial legislation.

"The judicial power of the State of Idaho is vested in a court for the trial of impeachments, a Supreme Court, district courts, probate courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established. . . ."

Article 5, Section 2, *Constitution of Idaho.*
State ex rel. McKelvey v. *Barnes*, 55 Idaho 578, 45 P. 2d 293.

"The court does not exercise legislative functions in interpreting, construing or giving meaning to a legislative act."

Mountain View Rural Tel. Co. v. *Interstate Tel. Co.*, 55 Idaho 514, 76 P. 2d. 723.
State v. *Clausen*, 146 Wash. 588, 264 Pac. 403.
People v. *Bruner*, 343 Ill. 146, 175 N. E. 400.

The Supreme Court of the United States derives its authority to review final judgments of the highest court of a

state from Title 28, Section 1257, U. S. C. A., which provides as follows:

> "§ 1257. STATE COURTS; APPEAL; CERTIORARI. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

This Court has repeatedly held that it will not review a decision of a State Supreme Court not involving a federal question.

"A decision of a state court construing the statutes of the state is not subject to review by the United States Supreme Court."

36 C. J. S. 167, *Federal Courts*, Section 264.

In the case of *Schuylkill Trust Co.* v. *Pennsylvania*, 58 Sup. Ct. 295, 302 U. S. 506, 82 L. ed. 392, this Court said:

> "First. When the case was previously heard we held the statute invalid as construed and applied and remanded the cause for further proceedings not incon-

sistent with our opinion. It is clear that the State courts were not precluded from construing the statute so as to eliminate the unconstitutional features. It follows that the appellant was not entitled, as a matter of right, to a general judgment in its favor exempting it from all tax.

"Second. The contention that the State courts really have not construed the act but have themselves amended it, and that this is judicial legislation forbidden by the constitution of Pennsylvania, is not open here. As the trial court pointed out, courts, in applying a statute, general and sweeping in its terms, may construe it as not intended to reach subjects which, by reason of constitutional prohibition, the legislature is without power to touch. Whether the courts of the Commonwealth exceeded their powers under the state constitution is not a federal question. We accept their construction of the act."

Appellants' argument appears to be that the Supreme Court of Idaho should have declared the Lewd and Lascivious Law unconstitutional, because the penalty provided was a cruel and unusual punishment contrary to the Idaho Constitution, that in fact the Supreme Court construed it so that the penalty is not cruel and unusual but that this construction was beyond the power of the Supreme Court and involved a legislative function, and that the usurpation of legislative power by the Supreme Court of Idaho contravenes the 14th Amendment of the Constitution of the United States. The *Schuylkill* case seems to answer that contention.

In the case of *Quong Ham Wah Co.* v. *Industrial Accident Commission of California*, 41 Sup. Ct. 373, 255 U. S. 445, 65 L. ed. 723, this Court said:

"But it is elementary that this court is without authority to review and revise the construction affixed to

a state statute as to a state matter by the court of last resort of the state. (Citing cases.)

* * * * * * *

"True, it is elaborately argued that the court below erred in supposing that the statute was susceptible of the construction which it affixed to it, and that, instead of adopting that construction, its duty was to hold the statute void for repugnancy to the constitution on the grounds which were urged. But this in a different form of statement but disputes the correctness of the construction affixed by the court below to the state statute, and assumes that that construction is here susceptible of being disregarded upon the theory of the existence of the discrimination contended for when, if the meaning affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears. It follows that the argument but accentuates the frivolous character of the Federal question relied upon.

"Dismissed for lack of jurisdiction."

Under the decision of the Supreme Court of Idaho in the cases of *State* v. *Evans*, *State* v. *Petty* and *State* v. *Deane*, it is possible that a sentence which might be assessed could be cruel and unusual if it were patently excessive. At this stage of the proceeding, however, these appellants cannot be heard to complain since they have never been tried. This Court will not, and the Idaho courts will not, presume them guilty at this time. They are entitled to a trial by jury and appeal to the Supreme Court of Idaho, if their rights should be jeopardized. If the Idaho courts should find these appellants guilty and assess an excessive penalty, at that point this Court may on petition interfere.

This Court should not at this time accept jurisdiction of

this case, because there is no federal question which will justify the exercise of jurisdiction.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 675

JAMES PETTY AND TOM E. DEANE, *Appellants,*

vs.

STATE OF IDAHO, *Appellee*

MOTION TO DISMISS

Comes now Robert E. Smylie, Attorney General of the State of Idaho, for and on behalf of the State of Idaho, Appellee in the above entitled case, and moves this Honorable Court for its Order dismissing the above entitled appeal from the Supreme Court of the State of Idaho, for the reason that this Honorable Court has no jurisdiction of the subject matter of the case for the reason that there is no sufficient federal question for this Court to take jurisdiction.

Dated this 24th day of January, 1953.

ROBERT E. SMYLIE,
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State of Idaho,

WILLIAM H. BAKES
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